

The Convenience of the Employer Doctrine and State Trooper Cash Meal Allowances Under the Internal Revenue Code: *Commissioner v. Kowalski*

In *Commissioner v. Kowalski*¹ the United States Supreme Court held that cash meal allowances paid to state troopers may not be excluded from gross income. This issue had been litigated before several federal courts of appeals in a series of decisions known as the "state trooper" cases. Some circuits held that the payments were excludable² while other circuits and the Tax Court held that such allowances must be taxed.³ After *Kowalski* the only remaining nontaxable cash meal allowances are those paid to certain federal employees.⁴

The broader significance of *Kowalski*, however, is the Supreme Court's interpretation of the Internal Revenue Code. From the earliest days of taxation under the sixteenth amendment it has been recognized by the courts and executive branch that some items received by employees are necessary for the performance of their jobs and should not be taxed. The resulting "convenience of the employer" doctrine⁵ has undergone several

1. 434 U.S. 77 (1977). For other student commentary on *Kowalski*, see Note, *I.R.C. § 119 Does Not Exclude Cash Meal Allowances From Income*, 11 CREIGHTON L. REV. 1053 (1978); Note, *The Taxability of Cash Meal Allowances: Form Prevails Over Substance*, 38 LA. L. REV. 907 (1978); Note, 24 N.Y. L. SCH. L. REV. 276 (1978); Note, *Commissioner v. Kowalski: Examination of Cash Reimbursements to State Troopers for Meals*, 5 OHIO N.L. REV. 495 (1978); Recent Decision, *A Cash Meal Allowance Received by State Troopers is Includable in Gross Income*, 9 TEX. TECH. L. REV. 776 (1978); Note, *Meal Allowance for State Troopers Not Excludable from Gross Income*, 52 TUL. L. REV. 650 (1978). See also Case Comment, *State Police Subsistence Allowances and Section 119 of the Internal Revenue Code*, 12 VAL. L. REV. 197 (1977), which predicted the result in *Kowalski* on the basis of *United States v. Koerner*, 550 F.2d 1362 (4th Cir. 1977), *cert. denied*, 434 U.S. 984 (1977).

2. *Kowalski v. Commissioner*, 544 F.2d 686 (3rd Cir. 1976), *rev'd*, 434 U.S. 77 (1977); *United States v. Smith*, 543 F.2d 1155 (5th Cir. 1976), *cert. granted, vacated, and remanded for further consideration*, 434 U.S. 978 (1977); *United States v. Keeton*, 383 F.2d 429 (10th Cir. 1967); *United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966); *United States v. Barrett*, 321 F.2d 911 (5th Cir. 1963); *Saunders v. Commissioner*, 215 F.2d 768 (3rd Cir. 1954).

3. *United States v. Koerner*, 550 F.2d 1362 (4th Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); *Wilson v. United States*, 412 F.2d 694 (1st Cir. 1969); *Magness v. Commissioner*, 247 F.2d 740 (5th Cir. 1957), *cert. denied*, 355 U.S. 931 (1958); *Ghastin v. Commissioner*, 60 T.C. 264 (1973); *Hyslope v. Commissioner*, 21 T.C. 131 (1953).

Cases that have followed *Kowalski* on the issue of cash meal allowances include *Friar v. United States*, [1978] FED. TAXES (P-H)(42 A.F.T.R.2d ¶78-5072) (W.D. Mo. Apr. 10, 1978); *Cox v. United States*, [1978] FED. TAXES (P-H)(42 A.F.T.R.2d ¶78-5109) (D. Nev. Mar. 3, 1978); *Elliott v. United States*, [1978] FED. TAXES (P-H)(41 A.F.T.R.2d ¶78-541) (N.D. Ala. Feb. 15, 1978); *Bassett v. United States*, [1978] FED. TAXES (P-H)(41 A.F.T.R.2d ¶78-540) (N.D. Ala. Feb. 15, 1978); *Cousins v. United States*, [1978] FED. TAXES (P-H)(41 A.F.T.R.2d ¶78-427) (N.D. Ala. Dec. 30, 1977); *Austin v. Commissioner*, 1977 T.C.M. (P-H) ¶77,434.

4. Cash meal allowances would still be nontaxable under I.R.C. § 912 which excludes certain allowances paid to federal civilian employees stationed outside the continental United States, and under Treas. Reg. § 1.61-2(b), which excludes subsistence, quarters, and uniform allowances of members of the armed forces, the Coast and Geodetic Survey, and the Public Health Service.

5. The phrase "convenience of the employer" has been used in two ways. It has sometimes been used to represent a judicial and administrative *doctrine* that has roots in the early history of income tax

changes and is currently codified in section 119 of the Internal Revenue Code. This Case Comment will examine the way in which the Supreme Court construed sections 119 and 61 of the 1954 Code and their relationship to the convenience of the employer doctrine. It will also attempt to justify the different tax treatment generally accorded state troopers and armed forces personnel.

I. STATUTORY PROVISIONS

A. *Section 61: Definition of Gross Income*

Four sections of the Internal Revenue Code have been applied in the so-called "state trooper" cases. The first is section 61, which defines gross income as follows: "[G]ross income means all income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, and similar items"⁶ A leading case in which the United States Supreme Court attempted to delineate the contours of section 61 was *Commissioner v. Glenshaw Glass*.⁷ In that case the Court stated that Congress intended to use "the full measure of its taxing power" when it drafted section 61, applying "no limitations as to the source of taxable receipts, nor restrictive labels as to their nature . . . [in order] to tax all gains except those specifically exempted."⁸ Apart from statutory exclusions, the Court held that if an item of income was an "undeniable accession to wealth, clearly realized, and over which the [taxpayer had] complete dominion,"⁹ it was income.

Despite very broad judicial definitions of income in cases such as *Glenshaw Glass*, courts have at other times created exemptions to income. The convenience of the employer doctrine, which is one example, was first articulated in *Jones v. United States*,¹⁰ a case concerning the quarters allowance of an army officer. The doctrine in general excludes from gross income meals and lodging provided by the employer in those situations in which an employee could not do his job without them. The Court of Claims stated in *Jones*: "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operation as to

law and was adopted in the 1954 Code. At issue in *Kowalski* was whether the 1954 codification served to exclude the common-law doctrine. The phrase has also been used as one of six *requirements* of section 119 which an employee benefit must pass in order to be excluded from taxation. Note, *Dissection of a Maligancy: The Convenience of the Employer Doctrine*, 44 NOTRE DAME LAW. 1104, 1109, 1113 (1969).

6. I.R.C. § 61(a)(1).

7. 348 U.S. 426 (1955).

8. *Id.* at 429-30.

9. *Id.* at 431.

10. 60 Ct. Cl. 552 (1925). Other cases often cited for this proposition include *Eisner v. Macomber*, 252 U.S. 189 (1925) and *Gould v. Gould*, 245 U.S. 151 (1917).

embrace matters pointed out. In case of doubt, they are construed most strongly against the Government and in favor of the citizen."¹¹

*B. Section 119: Meals and Lodging Furnished
for the Convenience of the Employer*

The second Code section relevant to *Kowalski* is section 119, which excludes meals and lodging furnished for the convenience of the employer from gross income.¹² Two of its requirements are pertinent to the state trooper cases: the benefit must be for the convenience of the employer and it must be provided on the business premises. After its enactment, it was unclear whether section 119 was intended to end the judicially created

11. 60 Ct. Cl. at 571-72 (quoting *Gould v. Gould*, 245 U.S. 151, 151 (1917)).

12. When *Kowalski* was decided, I.R.C. § 119 provided:

There shall be excluded from gross income of any employee the value of any meals or lodging furnished to him by his employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or
(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Congress has recently changed § 119 in two separate acts. First, under a bill to prevent the issuance of regulations to tax fringe benefits, the original § 119 is now subsection (a) and subsection (b)(1) of the statute. Paragraphs (2) and (3) of subsection (b) are as follows:

(2) Certain factors not taken into account with respect to meals. In determining whether meals are furnished for the convenience of the employer, the fact that a charge is made for such meals, and the fact that the employee may accept or decline such meals, shall not be taken into account.

(3) Certain fixed charge for meals.—

(A) In general.—If—

(i) an employee is required to pay on a periodic basis a fixed charge for his meals, and
(ii) such meals are furnished by the employer for the convenience of the employer,

there shall be excluded from the employee's gross income an amount equal to such fixed charge.

(B) Application of subparagraph (A).—Subparagraph (A) shall apply—

(i) whether the employee pays the fixed charge out of his stated compensation or out of his own funds, and
(ii) only if the employee is required to make the payment whether he accepts or declines the meals.

The effect of this amendment was to invalidate Treas. Reg. § 1.119-1(a)(3)(i) while upholding Treas. Reg. § 1.119-1(a)(3)(ii). Fringe Benefits, Pub. L. No. 95-427, § 4, 92 Stat. 996 (1978) (amending I.R.C. § 119).

Second, the Tax Treatment Extension Act of 1977 extends the exclusion of § 119 to the spouse and dependents of the employee for benefits furnished "by or on behalf of his employer." Pub. L. No. 95-615, § 205, 92 Stat. 3097 (1978).

In addition, a separate provision, § 3 of the Fringe Benefits law forgives taxes that troopers may have owed for the years 1970 to 1977. While *Kowalski* was pending in the courts for six years, troopers signed waivers of the three-year statute of limitations on audits, choosing instead to receive refunds of meal allowance withholdings. As a result, the estimated tax liability for New Jersey troopers for the period was \$4,500,000, an average of \$2,000 per member. The maximum liability for an individual was an estimated \$6,006. *Jersey Police Get Lenient I.R.S. Audits*, N.Y. Times, May 21, 1978, § 1, at 34, col. 1. A unique feature of this act is that troopers who had paid taxes in good faith for this period were prohibited from receiving a refund. Fringe Benefits, Pub. L. No. 95-427, § 3(b)(1), 92 Stat. 996 (1978) (amending I.R.C. § 119).

convenience of the employer doctrine or whether it was merely intended as an additional exemption for meals and lodging. It has been said that "[s]ection 119 of the 1954 Code ended the period of administrative experimentation (or bungling) with the 'convenience of the employer' doctrine regarding meals and lodging."¹³ The judicial attitude toward section 119 prior to *Kowalski*, however, appeared to be that the statute was merely an addition to the prior law, not a new beginning.¹⁴ The courts placed great reliance on *Jones* and other early cases as precedent. Two leading state trooper cases, reaching opposite conclusions, illustrated the consequences of this judicial preference for case law over statutory law.¹⁵

*Morelan v. United States*¹⁶ was an Eighth Circuit decision allowing an exclusion under section 119 for the State of Minnesota's three dollars per diem allowance for meals and other expenses. The court was convinced that the payments were actually made for the employer's convenience because of the restrictive conditions under which the allowance was paid. The state paid only a nominal amount for several items,¹⁷ strictly regulating how that amount could be earned. For instance, the trooper could only receive the allowance for days of active duty and was paid a different allowance for travel outside his normal patrol area. There were strict rules about when and where the trooper could eat. Of major significance to the Eighth Circuit was the state's requirement that troopers eat in a public place which, according to the court, served the purposes of displaying the authority of the state, allowing the public to meet its police force, and dispensing information concerning traffic laws and driving conditions.¹⁸ The court also had no trouble finding that the business premises of the highway patrol consisted of the entire State of Minnesota.¹⁹

The second leading state trooper case is *Wilson v. United States*,²⁰ which held that the allowance received by New Hampshire troopers must be taxed. The Court of Appeals for the First Circuit began its analysis by invoking section 61 and the broad interpretation given it by the federal courts. Under section 61, exclusions such as those provided by section 119 must be seen as acts of legislative grace and must be narrowly applied. Furthermore, the court found that a textual analysis of section 119 did not support an exemption for the cash allowance. The statutory language "the value of meals . . . furnished to him by his employer . . . on the

13. B. BITTKER & L. STONE, *FEDERAL INCOME, ESTATE, AND GIFT TAXATION* 59 (4th ed. 1972).

14. See, e.g., *Commissioner v. Kowalski*, 544 F.2d 686 (3rd Cir. 1976), discussed at note 34 *infra*.

15. *Wilson v. United States*, 412 F.2d 694 (1st Cir. 1969); *Morelan v. United States*, 356 F.2d 199 (8th Cir. 1966).

16. 356 F.2d 199 (8th Cir. 1966).

17. Other expenses included parking meter charges, uniform cleaning, replacement of uniform accessories, and cost of telephone at home. *Id.* at 200.

18. See 356 F.2d at 202.

19. *Id.* at 203. *Accord*, *United States v. Barrett*, 321 F.2d 911 (5th Cir. 1963).

20. 412 F.2d 694 (1st Cir. 1969), *aff'g* 292 F. Supp. 200 (D.N.H. 1968).

business premises" could not be equivalent to "the cost of meals reimbursed by the employer purchased in virtually any privately owned and operated restaurant in the State of New Hampshire."²¹ The *Wilson* court did not reach the issue of the convenience of the employer requirement. Nevertheless, the opinion did hold that New Hampshire could not be the business premises of the employer and that when state troopers were eating in restaurants, they were by definition off duty.

C. Section 120: Exclusion of Statutory Meal Allowances

The third Code section relevant to the issue in *Kowalski* is section 120 which was repealed in 1958.²² That section specifically excluded state and local police force meal allowances provided that the allowance was created by statute, that the exclusion was limited to five dollars per day, and that there was no separate deduction for the expense, thereby preventing a double deduction.²³ Congress repealed this provision because it was inequitable to allow only a few to deduct an expense common to so many and also because police departments were creating meal allowances where none had existed before.²⁴

D. Section 162: Deduction of Trade and Business Expenses

A fourth statute, little used in this context, is section 162 which allows a deduction of certain trade and business expenses from income. Of the state trooper cases, only *Kowalski* and *Morelan*²⁵ used section 162 and only as an alternative basis to exclusions under section 61 or section 119. The statute provides:

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including— . . . (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in pursuit of a trade or business²⁶

21. Paraphrasing *Wilson v. United States*, 292 F. Supp. 200, 205 (D. N.H. 1968), *aff'd*, 412 F.2d 694 (1st Cir. 1969).

22. The handful of cases litigated discussed what was a subsistence allowance, who could be classified as police officers, and whether a later statute could cover a preexisting allowance. *United States v. Shirah*, 253 F.2d 798 (4th Cir. 1958) (definition of subsistence allowance); *Wyndham v. United States*, 197 F. Supp. 856 (D. S.C. 1961) (game wardens qualify as policemen); *Springer v. United States*, 206 F. Supp. 118 (D. Ore. 1962) (retroactive enactment not effective); *Johnson v. United States*, 1962 FED. TAXES (P-H) (9 A.F.T.R.2d ¶62-623) (S.D. Ga. Apr. 24, 1962) (retroactive enactment effective).

23. Current § 120 excludes "amounts contributed by an employer on behalf of an employee . . . under a qualified group legal services plan . . . or the value of legal services provided, or amounts paid for legal services under a qualified legal services plan" I.R.C. § 120 was added by Tax Reform Act of 1976, Pub. L. No. 94-455, § 2134(a), 90 Stat. 1926.

24. Technical Amendments Act of 1958, Pub. L. No. 85-866, § 3, 72 Stat. 1606. H. R. REP. No. 775, 85th Cong., 1st Sess. 7, reprinted in [1958] U.S. CODE CONG. & AD. NEWS 4791.

25. *Kowalski v. Commissioner*, 65 T.C. 44 (1975), *aff'd*, 434 U.S. 77 (1977); *United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966), *aff'g* 237 F. Supp. 879 (D. Minn. 1965).

26. I.R.C. § 162 (a)(2).

In the leading case of *United States v. Correll*,²⁷ the Supreme Court upheld an Internal Revenue Service requirement²⁸ that the travel away from home include an overnight stay before the expense could be deducted.

II. *Commissioner v. Kowalski*

A. *Facts*

Robert J. Kowalski had been a member of the New Jersey State Police since 1960. When he and his wife filed their joint income tax return for 1970, they reported his income as \$9066. Of this, \$8,739.38 was his base salary. The remaining \$326.45 was that portion of the meal allowance that the State of New Jersey had reported on the taxpayer's W-2 Form as income. New Jersey adopted this reporting procedure on October 1, 1970 on advice from the federal government. The remaining \$1,371.09 of the allowance was not reported. The Internal Revenue Service initially disallowed a deduction of \$405 as a food maintenance expense deduction and assessed an additional \$69 in taxes. After a subsequent discovery of the unreported portion of the meal allowance, the total deficiency was raised to \$330.70.²⁹

The State of New Jersey considered its meal allowance noncompensatory because it was begun in 1949 to replace an inefficient and more expensive in-kind system which also had been considered noncompensatory. Accordingly, the allowance was separated from salary and paid in advance. By 1970, New Jersey's system of paying cash allowances had changed substantially and some of its characteristics could no longer be considered noncompensatory. For example, except for periods of active duty with the armed forces, the meal allowance was never stopped for periods of vacation, sick leave, or assignments where meals in kind were available. Furthermore, troopers were not required to spend their meal allowances on their mid shift meals, nor were they required to account for the manner in which the money was spent.³⁰

Kowalski petitioned the United States Tax Court on three grounds: first, that the allowance was not income within the meaning of section 61; second, even if it were income, it could be excluded under section 119; and third, if it were considered income it could be deducted under section 162. A majority of the court held that the allowance was income and not excludable under section 119. Nevertheless, since Kowalski had been away from home overnight for two hundred days on general field, riot, and recruiting duty, two-thirds of the \$1704 maximum allowance was allowed as a deduction under section 162.³¹

27. 389 U.S. 299 (1967).

28. I.T. 3395, 1940-2 C.B. 64.

29. *Kowalski v. Commissioner*, 65 T.C. 44, 45-49 (1975) *rev'd*, 544 F.2d 686 (3rd Cir. 1976), *rev'd*, 434 U.S. 77, 79-82 (1977).

30. 65 T.C. at 44-49; 434 U.S. at 79-82.

31. 65 T.C. at 49.

In a dissenting opinion, one member of the court found the expense entirely deductible under section 162(a) as an ordinary and necessary business expense, without regard to whether it was incurred in travel.³² Apparently, the dissent was trying to circumvent the requirement of an overnight stay upheld by the Supreme Court in *Correll* for the deduction of traveling expenses under section 162(a)(2). A second dissenting opinion written by Judge Sterrett and joined by five other judges held that the exclusion should be allowed solely under section 61.³³

The Court of Appeals for the Third Circuit reversed the Tax Court in a brief and rather ambiguous opinion³⁴ that may have been based either on section 119³⁵ or on section 61.³⁶ The reason for this ambiguity was that the opinion began by asserting that the meal allowance was excludable under section 119. Later, however, the opinion stated that the reasons for exclusion are contained in two section 61 cases: the first state trooper case to allow an exclusion, *Saunders v. Commissioner*,³⁷ and the dissenting opinion of Judge Sterrett in the Tax Court's decision in *Kowalski*.

B. Holding

In contrast to the confusion created by the Third Circuit, the Supreme Court clearly ruled on both the section 61 and section 119 issues. The Court briefly considered whether section 119 allowed exclusion of a *cash* allowance and concluded that the very use of the word "meals" meant that it did not.³⁸ Chief support for this interpretation was the legislative history of section 119 and section 1.119-1 of the Treasury Regulations.

The remainder of the opinion discussed in detail why there could be no cash allowance under a section 61, common-law convenience of the employer doctrine that existed apart from section 119. First, the Court traced the history of the doctrine from 1919 through the passage of the 1954 Code. It concluded that the doctrine as developed was fairly well settled, but had some contradictory features that made it untidy to apply.³⁹ Second, the Court discussed the legislative history of section 119. It held that this section "comprehensively modified the prior law, both expanding and contracting the exclusion for meals and lodging previously provided, and it must therefore be construed as its draftsmen obviously intended it to

32. *Id.* at 62 (Drennen, J., dissenting).

33. *Id.* at 65 (Sterrett, J., dissenting).

34. 544 F.2d 686 (3rd Cir. 1976).

35. Brief for Petitioner at 7, 10 LAW REPRINTS, TAX SERIES No. 2, at 53, *Commissioner v. Kowalski*, 434 U.S. 77 (1977). Note, *Meal Allowances for State Troopers Not Excludable From Gross Income*, 52 TUL. L. REV. 650 (1978).

36. *Commissioner v. Kowalski*, 434 U.S. 77, 82 (1977). Brief for Respondent at 6, 10 LAW REPRINTS, TAX SERIES No. 2, at 104, *Commissioner v. Kowalski*, 434 U.S. 77 (1977).

37. 215 F.2d 768 (3rd Cir. 1954).

38. 434 U.S. at 84.

39. *Id.*

be—as a replacement for the prior law, designed to ‘end [its] confusion.’”⁴⁰ Third, the Court rejected a minor argument of the taxpayer that it is inequitable to allow members of the armed forces to exclude subsistence and quarters allowances solely under a section 61 regulation,⁴¹ while not allowing similar treatment to cash meal allowances of state troopers. The Court stated that “arguments of equity have little force in construing the boundaries of exclusions and deductions from income many of which, to be administrable, must be arbitrary.”⁴²

In a dissenting opinion joined by Chief Justice Burger, Justice Blackmun argued that section 162 should allow a deduction of the meal allowance as an ordinary and necessary expense of travel regardless of the Court’s prior decision in *Correll*, which required an overnight stay for meals to be deductible.⁴³ He also argued at length that since section 119 has no express limit to in-kind provisions, cash payments should be exempt. Significantly, he agreed with the majority that there can be no exclusion under section 61, thereby dismissing the main argument of the taxpayer,⁴⁴ the dissenting opinion of six members of the Tax Court,⁴⁵ and possibly the opinion of the Third Circuit,⁴⁶ if the latter is to be construed as based upon section 61.

III. ANALYSIS

A. *The Application of Section 119 to Cash Meal Allowances*

The Supreme Court in deciding *Commissioner v. Kowalski* did not feel compelled to discuss at length why the state trooper’s cash meal allowance could not qualify as an exclusion under section 119 of the Internal Revenue Code of 1954. In the words of the Court: “By its terms, § 119 covers *meals* furnished by the employer and not *cash* reimbursements for meals.”⁴⁷ Since the Court decides few tax cases and has never before addressed section 119,⁴⁸ this exercise of judicial restraint is potentially disappointing to those who would like to use *Kowalski* as the definitive judicial explanation of section 119.

Nevertheless, the Court’s more lengthy discussion of why there can be no exclusion under section 61 is quite useful in explaining its view of

40. *Id.* at 93 (brackets in original).

41. Treas. Reg. § 1.61-2(b) (cited in 434 U.S. at 95).

42. 434 U.S. at 95-96.

43. *Id.* at 96-98. For a discussion of *Correll*, see text accompanying note 27 *supra*. Justice Blackmun served on the Eighth Circuit court when it decided the state trooper case, *United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966), discussed in text accompanying notes 16-19 *supra*.

44. Brief of Respondent, 10 LAW REPRINTS, TAX SERIES NO. 2, at 98, *Commissioner v. Kowalski*, 434 U.S. 77 (1977).

45. 65 T.C. at 65 (1975).

46. 544 F.2d 686, 687 (3rd Cir. 1976).

47. 434 U.S. at 84.

48. Justice Harlan, however, did use § 119 as an example of a statutory exclusion in his concurring opinion in *Rudolph v. United States*, 370 U.S. 269, 273 (1962).

section 119. That discussion presented a straightforward interpretation of the legislative history and construed the two components of the statute pertinent to the state trooper cases.⁴⁹

1. *The Legislative History of Section 119*

The most significant step in the development of the convenience of the employer doctrine was the enactment of section 119 of the 1954 Code. The House of Representatives originally constructed section 119 to read:

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer (whether or not furnished as compensation) but only if—

- (1) such meals or lodging are furnished at the place of employment, and
- (2) the employee is required to accept such meals or lodging at the place of employment as a condition of his employment.⁵⁰

The apparent purpose of the House was to discard altogether the term “convenience of the employer” and begin anew. The then current state of the law was objectionable because the Internal Revenue Service and the courts would not exclude the benefit from income “even though the employee must accept such meals and lodging in order to properly perform his duties.”⁵¹

The Senate, however, found the new two-part test to be ambiguous because it rejected any determination whether an item was compensatory or noncompensatory. The Senate proposed to keep the term “convenience of the employer,” calling it “the basic test of exclusion.”⁵² If a benefit were found to be for the employee’s convenience, it could not be excluded. In the conference committee report, the House acceded to the Senate’s version, which now comprises subsection (a) and paragraph (b) (1) of section 119.⁵³

Both houses, however, agreed on other points. First, the purpose of section 119 was to “end the confusion as to the tax status of meals and lodging furnished an employee by the employer.”⁵⁴ Second, the exclusion was limited to benefits in kind.⁵⁵ Third, the benefits must be provided on the business premises of the employer.⁵⁶ Finally, the phrase “convenience

49. 434 U.S. at 90-95.

50. H.R. 8300, 83d Cong., 2d Sess. § 119 (1954).

51. H.R. REP. NO. 1337, 83d Cong., 2d Sess. 18 (1954) *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 4017, 4175 [hereinafter cited as HOUSE REPORT].

52. S. REP. NO. 1622, 83d Cong., 2d Sess. 19 (1954), *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 4621, 4649 [hereinafter cited as SENATE REPORT].

53. H.R. REP. NO. 2543, 83d Cong., 2d Sess. 27 (1954), *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 5280, 5286 [hereinafter cited as CONFERENCE REPORT].

54. HOUSE REPORT, *supra* note 51, at 18, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS at 4042; SENATE REPORT, *supra* note 52, at 19, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS at 4649.

55. HOUSE REPORT, *supra* note 51, at 39, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS at 4175; SENATE REPORT, *supra* note 52, at 190-91, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS at 4825.

56. CONFERENCE REPORT, *supra* note 53, at 27, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS at 5286.

of the employer" was not to be defined. Instead, the reports of the House, Senate, and conference committee gave several examples in which a taxpayer would meet all the necessary conditions.⁵⁷

A major contribution of *Kowalski* may be in ending the conflicting interpretations of the legislative history by favoring a straightforward view and providing some additional explanations to ambiguous ideas presented in the congressional reports. For example, the technical appendix to the Senate report stated that "cash allowances for meals or lodging received by an employee will continue to be includable in gross income to the extent that such allowances constitute compensation."⁵⁸ The Eighth Circuit held in *Morelan v. United States*,⁵⁹ the Minnesota state trooper case, that since the state did not classify its allowances as compensation, they were excludable from income. A second interpretation of this statement was made by the taxpayer in *Kowalski*, who claimed that the report "by negative implication . . . [created] a class of noncompensatory cash meal payments."⁶⁰ In contrast to these two views, the Court in *Kowalski* agreed with the government that "it is much more reasonable to assume that the cryptic statement . . . was meant to indicate only that meal allowances otherwise deductible under section 162(a)(2) [as traveling expenses] . . . were not affected by § 119."⁶¹ The Court reasoned that if cash meal allowances were excludable merely at the convenience of the employer, "then cash would be more widely excluded from income than meals in kind, an extraordinary result given the presumptively compensatory nature of cash payments and the obvious intent of § 119 to narrow the circumstances in which meals could be excluded."⁶² The Court's rejection of the two questionable interpretations is valid. The intent of Congress to end the confusion would not be served if section 119 were not comprehensive.

57. See, e.g., HOUSE REPORT, *supra* note 51, at A39, reprinted in [1954] U.S. CODE CONG. & AD. NEWS at 4175-76, which gives the following examples:

(1) A civil-service employee of a State is employed at an institution and is required, as a condition of his employment, to live and eat at the institution in order to be available for duty at any time. Under the applicable State statute, his meals and lodging are regarded as a part of the employee's compensation. The employee would nevertheless be entitled to exclude the value of such meals and lodging from gross income.

(2) An employee of an institution is given the choice of residing at the institution free of charge, or of residing elsewhere and receiving an allowance of \$30 per month in addition to regular salary. If he elects to reside at the institution the value to the employee of the lodging furnished by the employer will be includable in gross income, because his residence at the institution is not required as a condition of his employment.

These examples were adapted almost exactly as written in Treas. Reg. § 1.119-1(d) as examples (5) and (6). T.D. 6220, 1957-1 C.B. 34, 58, renumbered by T.D. 6745, 1964-2 C.B. 42, 45-46.

58. SENATE REPORT, *supra* note 52, at 190-91, reprinted in [1954] U.S. CODE CONG. & AD. NEWS at 4825.

59. 356 F.2d 199 (8th Cir. 1966).

60. 434 U.S. at 92.

61. *Id.* at 94-95.

62. *Id.* at 94.

The taxpayer in *Kowalski* presented a second view of the legislative history to support his contention that cash allowances are not taxable under section 61. He argued that the acquiescence of the House to the Senate on the language of section 119 including the phrase "convenience of the employer" signified a legislative affirmation of a separate common-law convenience of the employer doctrine, excluding conflicting glosses found in cases and rulings arising just prior to the passage of the 1954 Code.⁶³ According to the *Kowalski* Court, although the Senate did choose to reject these decisions and to retain the convenience of the employer doctrine, the Senate modified the doctrine in three steps. First, section 119 explicitly rejected employer's characterization in its last clause; in its place, "business necessity" was intended to limit "convenience" as defined in *Van Rosen v. Commissioner*.⁶⁴ In that case, which was brought under the 1939 Code, the Tax Court refused to extend the exclusion of cash allowances granted to military personnel in *Jones v. United States* to civilian employees of the federal government. The court held that the proper test of exclusion was whether the taxpayer was unable to take, to appropriate, to use, or to spend the allowance in accordance with his own preferences. Second, the Senate and conference reports provided specific examples to show when the proper conditions were present to allow exclusion.⁶⁵ Third, the Senate adopted the House's "business premises" restriction, a new requirement for the convenience of the employer doctrine.⁶⁶

This view of the legislative history of section 119 is presented in a section of the opinion that is terse and difficult to analyze. Nevertheless, an understanding of this portion is necessary to fully comprehend the highly quotable summary of the Court that the statute "comprehensively modified the prior law, both expanding and contracting the exclusion for meals and lodging previously provided, and . . . must therefore be construed as its draftsmen obviously intended it to be—as a replacement for the prior law, designed to 'end [its] confusion.' "⁶⁷

2. The Construction of Section 119

Perhaps the most direct guidance of the Supreme Court will come from its validation of Treasury Regulation section 1.119-1(c)(2) which states that the "exclusion provided by section 119 applies only to meals and lodging furnished *in kind*."⁶⁸ This requirement that the benefits be in kind

63. See *Saunders v. Commissioner*, 215 F.2d 768 (3rd Cir. 1954) (state trooper cash meal allowances excludable); *Doran v. Commissioner*, 21 T.C. 374 (1953) (state statute determinative of compensatory nature of lodging); *Mim*, 6472, 1950-1 C.B. 15 (business purpose not determinative of excludability).

64. 17 T.C. 834 (1951).

65. See note 57 *supra*.

66. 434 U.S. at 93.

67. *Id.*

68. Treas. Reg. § 1.119-1 (c)(2) (emphasis added).

found support in the use of "meals" in the statute and in specific restrictions in the legislative history to benefits in kind. Presumably, the Court also deferred to a reasonable administrative determination amplifying the specific language of the statute.⁶⁹

The Court, unfortunately, did not provide a new and more useful definition of the convenience of the employer requirement as it appears in section 119. It did conclude that in choosing that phrase as a requirement in the statute, Congress "obviously intended to adopt the meaning of that term as it had developed over time"⁷⁰ except to the extent that prior definitions would be inconsistent with other requirements of section 119. The Court pointed out that *Van Rosen v. Commissioner*,⁷¹ which used a business-necessity rationale, provided the controlling court definition at the time of the 1954 recodification. The rationale in *Van Rosen*, therefore, was endorsed by the Supreme Court as the meaning of convenience of the employer as it is used in section 119. In *Van Rosen* the Tax Court stated:

[T]hough there was an element of gain to the employee, in that he received subsistence and quarters which otherwise he would have had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and needs of the employee were satisfied was plainly secondary and incidental to the employment.⁷²

Ironically, this was the very definition upon which the Third Circuit had relied in the first state trooper case to justify an exclusion.⁷³ In contrast to the lower court, the Supreme Court's reliance on *Van Rosen* is significant in the way it imposes restrictions on the convenience of the employer doctrine. Through *Van Rosen*, the Court provided a narrower criterion with which to define the limits of convenience and may have prevented the lower courts from ignoring the provision of section 119 that employer's characterization is irrelevant as a test of exclusion. Neither an employer's whim nor mistaken idea that meals serve a business purpose governs the granting of the exclusion. Rather, it is solely a question of practicality.

69. *United States v. Correll*, 389 U.S. 299, 307 (1967).

70. 434 U.S. at 93.

71. 17 T.C. 834 (1951).

72. *Id.* at 838 (quoted in 434 U.S. at 88 n.21). Although the case is an excellent piece of reasoning, *Van Rosen* predated § 119 and was brought under § 22(a) of the 1939 Code (predecessor of the current § 61). Perhaps the best statement available from a case that treated § 119 was made by Judge Rosenn in his dissenting opinion in *Jacob v. United States*, 493 F.2d 1294, 1300 (3d Cir. 1974) (emphasis in original). If the employee had control over "the time, duration, value, and content of the meals and he could adjust these factors to suit his own convenience," then the benefit was clearly outside the convenience of the employer doctrine. The Third Circuit's opinion in *Kowalski v. Commissioner*, 544 F.2d 686, 687 (3d Cir. 1976), consists mostly of a quotation from the majority opinion in *Jacob v. United States*, in turn, is based principally upon the state trooper cases.

73. *Saunders v. Commissioner*, 215 F.2d 768, 774 (3d Cir. 1954).

A major weakness of *Kowalski* is that it does not resolve the continued conflict among the federal courts over the limits of business premises. The failure to define these limits is particularly troublesome given one of the examples from the Treasury Regulations which defines business premises for a cowhand as the rented government land on which he is herding his employer's cattle.⁷⁴ The cases favorable to exclusion of state trooper allowances envisioned the entire state as the premises;⁷⁵ the others found that construction farfetched.⁷⁶ The Supreme Court in *Kowalski* concluded that the phrase "on the business premises of the employer" was added by the Senate as a means of restricting the application of the doctrine.⁷⁷ Presumably, only the headquarters post of the state police would qualify, although the opinion does not so state. Thus, there is left open to the states the possibility that they could provide box lunches to all troopers to meet the new requirements of *Kowalski*.⁷⁸ Would the patrol car or roadside rest stop qualify as the business premises? If *Kowalski* is interpreted as approving *Wilson v. United States*,⁷⁹ the New Hampshire state trooper case, neither patrol cars nor rest stops would be considered business premises.

B. *The Common-Law Convenience of the Employer Doctrine of Section 61*

In reading *Commissioner v. Kowalski*, it is easy to focus solely on the construction that the Supreme Court gave to section 119. After its initial determination that cash meal allowances could not be excluded under section 119, the Court then used that section to narrow an exception to gross income, thereby obscuring the fact that the discussion concerned section 61. Section 61 is not merely a philosophical premise that asserts that Congress has broad power to tax "all income from whatever source derived," but also a substantive requirement. Denoting an item as not being income, therefore, can place it outside the taxing power of the Internal Revenue Code.

1. *Judicial and Administrative Developments Through 1954: Convenience, Compensation, Characterization, Cash, and Confusion*

The phrase "convenience of the employer" dates from the early days of modern income taxation under the sixteenth amendment. The phrase was first used in 1919 when the Internal Revenue Service ruled that the

74. Treas. Reg. § 1.119-1(c)(1).

75. *United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966); *United States v. Barrett*, 321 F.2d 911 (5th Cir. 1963).

76. *Wilson v. United States*, 412 F.2d 694 (1st Cir. 1969).

77. 434 U.S. at 93.

78. It has also been suggested that meal tickets issued for use in restaurants may meet the new standards of *Kowalski*. Note, *supra* note 35, at 656.

79. 412 F.2d 694 (1st Cir. 1969).

value of food and lodging received by seamen aboard ship could be excluded from taxable income.⁸⁰ Shortly thereafter the idea was adopted generally in the Treasury Regulations⁸¹ where it remained until passage of the 1954 Code.⁸² Throughout the doctrine's history, decisions affecting the exclusion of either meals or lodging would have an effect on the exclusion of the other.

The only generally agreed upon standard for excluding items given for the "convenience of the employer" was that the benefit had to be noncompensatory. That is, it could not appear to be given in exchange for the labor of the employee. Whether the benefit was noncompensatory was generally determined by one of two conflicting tests. Under identical circumstances, one taxpayer would be allowed an exclusion under the first test, but another taxpayer would be denied an exclusion if the alternate test were applied.⁸³ The first test considered "employer's characterization." An early ruling held that the lodging of federal Indian Service employees was to be included in income if it were paid from an account appropriated by Congress for the payment of compensation.⁸⁴ In contrast, the second test determined whether the benefit served a valid "business purpose." In separate decisions, the Internal Revenue Service ruled that cannery workers⁸⁵ and hospital employees⁸⁶ could exclude the value of meals and quarters furnished to them on the business site. By 1940, business purpose was the generally accepted test.⁸⁷

The landmark case for allowing the exclusion of the value of lodging received in kind was *Benaglia v. Commissioner*.⁸⁸ As the manager of a hotel, the taxpayer was required by his employer to be on the premises at all times. His accommodations were clearly "not by way of compensation for his services, not for his personal convenience, comfort, or pleasure, but solely because he could not otherwise perform the services required of him."⁸⁹

Under either test, after the meals or lodging had been determined to be noncompensatory, there was a second inquiry: whether cash was an acceptable substitute for the benefit conferred. In the earliest ruling on this second question, it was held that cash payments for supper money to employees who worked voluntarily after normal hours could be excluded

80. O.D. 265, 1 C.B. 71 (1919).

81. T.D. 2992, 2 C.B. 76 (1920).

82. Treas. Reg. 103, § 9.22(a)-3, Mim. 5023, 1940-1 C.B. 14.

83. Compare *Doran v. Commissioner*, 21 T.C. 374 (1953) (state law determinative of compensatory nature of lodging) with *Diamond v. Sturr*, 221 F.2d 264 (2d Cir. 1955) (state law not determinative of compensatory nature of lodging).

84. O.D. 914, 4 C.B. 85 (1921).

85. O.D. 814, 4 C.B. 84 (1921).

86. O.D. 915, 4 C.B. 85 (1921).

87. Mim. 5023, 1940-1 C.B. 14.

88. 36 B.T.A. 838 (1937).

89. *Id.* at 839.

from taxation.⁹⁰ In the first convenience of the employer case, *Jones v. United States*,⁹¹ the Court of Claims agreed. The taxpayer was an army officer stationed at Fort Monroe in Virginia who had been temporarily assigned to Washington, D.C. for four months. The Internal Revenue Service sought to tax not only the cash payments he received for the temporary quarters he rented in Washington but also the value of the quarters furnished in kind at his permanent duty station.⁹² First, the court examined in detail more than a century of army regulations regarding the furnishing of quarters and concluded that congressional purpose would be severely thwarted were the court to hold quarters taxable. The regulations constituted an "employer's characterization" and also demonstrated the military necessity of providing quarters. Second, the court noted that several of the early revenue acts specifically exempted the income of federal officials such as the President and judges and therefore it was well within the power of Congress to exclude others. Finally, relying on *Eisner v. Macomber*,⁹³ the court held that the cash allowance for quarters was not income derived from labor and could not be taxed.

While the Treasury soon acceded to *Jones* in the case of military allowances, the exclusion was not extended to other classes of taxpayers. The leading case under the 1939 Code was *Van Rosen v. Commissioner*⁹⁴ in which the Tax Court rejected the exclusion of a quarters and messing cash allowance to a civilian employee of the Army. The taxpayer was paid the allowance in lieu of closed shipboard facilities he would have occupied had they not been under repair. He lived at home in conditions no different from any other taxpayer who had a nondeductible personal expense.

Three decisions issued by the government, the Tax Court, and a circuit court illustrate that while it was generally agreed that "convenience of the employer" meant objective business purpose and could not cover cash allowances, there was no uniformity in the application of these tests. A 1950 ruling by the Internal Revenue Service stated:

The "convenience of the employer" rule is simply an administrative test to be applied only in cases in which the compensatory character of such benefits is not otherwise determinable. It follows that the rule should not be applied in any case in which it is evident from the other circumstances involved that the receipt of quarters or meals by the employee represents compensation for services rendered.⁹⁵

Although the purpose of the ruling was to narrow exclusions, it was not

90. O.D. 514, 2 C.B. 90 (1920).

91. 60 Ct. Cl. 552 (1925).

92. *Id.* at 553.

93. 252 U.S. 189 (1920).

94. Mim. 3413, V-1 C.B. 29 (1926).

95. 17 T.C. 834 (1951).

96. Mim. 6472, 1950-1 C.B. 15.

widely adopted by the courts.⁹⁷ In *Doran v. Commissioner*,⁹⁸ the Tax Court returned to employer's characterization as the principal determination of excludability. The employer in that case, the State of South Carolina, classified an employee's lodging as compensation and therefore the value of the lodging was held to be taxable.⁹⁹ "Convenience of the employer" and "compensation" were not mutually exclusive categories, according to the court, and therefore a benefit could be conferred for the employer's convenience and still be taxable.

The third development occurred in the first state trooper case to be appealed, *Saunders v. Commissioner*.¹⁰⁰ The Tax Court had held that the New Jersey cash meal allowance was reimbursement for a personal living expense. While the duties of troopers were military in nature, the troopers were civilians and the exclusion granted to military personnel could not be extended to them.¹⁰¹ The Third Circuit reversed on the ground that the meal allowance was an equivalent substitution for the in-kind system that New Jersey had previously used. Since the in-kind system had been noncompensatory, it was clear to the court that the allowance was also noncompensatory. Unlike the Tax Court, the Third Circuit was persuaded that the military nature of state police duties justified treating troopers differently from other taxpayers: without accepting the meals, the taxpayer could not perform his duties.¹⁰²

2. Kowalski and Section 61

In *Kowalski* the Supreme Court's discussion of the judicial and administrative development of the convenience of the employer doctrine formed a major portion of the Court's opinion. The Court examined the major rulings and cases and gave them a reasonable interpretation in light of its conclusion that "the convenience-of-the-employer doctrine is not a tidy one."¹⁰³

The Court, in setting forth its lengthy history,¹⁰⁴ intended to achieve one purpose—to show the need for congressional action in a confused area of the law. This purpose would seem unnecessary given the legislative history of section 119. But this judicial/administrative history serves a necessary second purpose that the Court did not emphasize—to show that the development of a section 61 doctrine excluding meals and lodging from income ended in 1954. This exposition was necessary because the taxpayer

97. Note, *supra* note 5, at 1118.

98. 21 T.C. 374 (1953).

99. *Id.* at 376.

100. 215 F.2d 768 (3rd Cir. 1954).

101. 21 T.C. 630, 634 (1954).

102. 215 F.2d at 774.

103. 434 U.S. at 84.

104. This history is similar to that given above and in other cases and commentaries. *See, e.g.,* *Diamond v. Sturr*, 221 F.2d 264 (2d Cir. 1955).

in *Kowalski* had based his case on a section 61 argument, as well as on sections 119 and 162. Only once in the twenty years since the enactment of section 119 had section 61 ever been mentioned in a case dealing with the convenience of the employer doctrine. The case was *Barrett v. United States*,¹⁰⁵ the first state trooper case decided under the 1954 Code, which held that cash allowances were nontaxable. Despite this absence of judicial development, Kowalski argued that the common-law exclusion was still viable.¹⁰⁶ Although this argument was rejected by the Tax Court, six dissenting judges agreed. Moreover, the vague per curiam decision of the Third Circuit in *Kowalski* may be read to support an exclusion based on section 61.

Kowalski was more than another state trooper case; it opened up for argument an area of law deemed closed by every court for two decades. If the Court had denied certiorari or ruled in favor of the taxpayer, it might have perpetuated two distinct and contradictory convenience of the employer doctrines, one legislative, the other judicial. The section 119 doctrine, restricted to employees eating meals provided by their employers at their place of business, is consonant with the Court's earlier decisions, such as *Commissioner v. Glenshaw Glass Co.*,¹⁰⁷ which declared that Congress has broad taxing powers. The judicial doctrine, on the other hand, allowed an employer to create a tax-free benefit so long as he could claim it served a business purpose.

The government argued in *Kowalski* that for the Court to sustain the taxpayer would cause great revenue losses.¹⁰⁸ This seems unlikely because the state trooper exemption has never been extended to other classes of taxpayers for cash allowances and because the courts have not automatically excluded all in-kind benefits.¹⁰⁹ Ruling in favor of the taxpayer, however, would have severely confused this area of the law by allowing the courts to use the Third Circuit's decision in *Kowalski* to justify exclusions on a case by case basis without rigorous legal reasoning, which was the main problem during the years before passage of the 1954 Code.

At the other extreme, it is unlikely that other exemptions based on section 61 are invalidated by *Kowalski* as the taxpayer had argued.¹¹⁰ The list of nontaxable items presented by Judge Sterrett of the Tax Court in his

105. 205 F. Supp. 307 (S.D. Miss. 1962), *aff'd*, 321 F.2d 911 (5th Cir. 1963).

106. Brief for Respondent at 18, 10 LAW REPRINTS, TAX SERIES No. 2, at 116, *Commissioner v. Kowalski*, 434 U.S. 77 (1977).

107. 348 U.S. 426 (1955). For further discussion of *Glenshaw Glass*, see text accompanying note 7 *supra*.

108. Petition for Writ of Certiorari at 8, 10 LAW REPRINTS, TAX SERIES No. 2, at 8, *Commissioner v. Kowalski*, 434 U.S. 77 (1977).

109. *Tougher v. Commissioner*, 51 T.C. 737 (1969), *aff'd per curiam*, 441 F.2d 1148 (9th Cir. 1971), *cert. denied*, 404 U.S. 856 (1971) (groceries from FAA commissary on Wake Island are taxable).

110. Brief in Opposition to Petition for Writ of Certiorari at 15, 10 LAW REPRINTS, TAX SERIES No. 2, at 35, *Commissioner v. Kowalski*, 434 U.S. 77 (1977).

dissenting opinion and repeated by the taxpayer before the Supreme Court¹¹¹ were quarters allowances for army officers,¹¹² meal allowances for state troopers,¹¹³ food and lodging for institutional and hotel employees,¹¹⁴ an expense paid trip to Germany,¹¹⁵ and food and lodging expenses incurred in moving.¹¹⁶ Each of these categories is either based on a case antedating the 1954 Code and therefore questionable as precedent, is adequately covered under a current Code section, or is an unusual exception in its own area of the tax law. The following points should be noted with respect to these categories. First, the Court in *Kowalski* held that state troopers and, by implication institutional and hotel employees, must meet the requirements of section 119.¹¹⁷ Second, the *Kowalski* Court also gave tacit approval to the exclusion of military allowances under Treasury Regulations section 1.61-2(b). In previous cases, the Court has stated explicitly that when a regulation or interpretation has stood without substantial change for several years, the regulation is presumed to have congressional approval.¹¹⁸ For the military allowance exclusion to rest solely on a regulation is inelegant but not fatal. Third, the courts prior to *Kowalski* generally have not allowed the exclusion of expense paid trips.¹¹⁹ Last, moving expenses for food and lodging are deductible under the 1954 Code.¹²⁰

C. *Kowalski as Determinative of the State Trooper Cases:
The Military Analogy*

The foregoing two parts of this analysis have discussed how the Supreme Court interpreted the Internal Revenue Code. This part discusses the Court's treatment of the narrow issue of whether state trooper meal allowances should be taxed.

Prior decisions had usually discussed the arduous nature of the duties of state troopers and on that basis either extended the exclusion granted to the allowances of military personnel to state troopers or found the comparison unpersuasive.¹²¹ At only one point in its opinion does the

111. 65 T.C. at 65; Brief for Respondent at 11, 10 LAW REPRINTS, TAX SERIES No. 2, at 109, Commissioner v. Kowalski, 434 U.S. 77 (1977).

112. *Bercaw v. Commissioner*, 165 F.2d 521 (4th Cir. 1948); *Jones v. United States*, 60 Ct. Cl. 552 (1925).

113. *United States v. Barrett*, 321 F.2d 911 (5th Cir. 1963); *Saunders v. Commissioner*, 215 F.2d 768 (3rd Cir. 1954).

114. *Diamond v. Sturr*, 221 F.2d 264 (2d Cir. 1955); *Benaglia v. Commissioner*, 36 B.T.A. 838 (1937).

115. *United States v. Gotcher*, 401 F.2d 118 (5th Cir. 1968).

116. *Cavanagh v. Commissioner*, 36 T.C. 300 (1961).

117. 434 U.S. at 93.

118. See, e.g., *United States v. Correll*, 389 U.S. 299, 305 (1967).

119. See, e.g., *Rudolph v. United States*, 370 U.S. 269 (1962). *Contra*, *United States v. Gotcher*, 401 F.2d 118 (5th Cir. 1968).

120. I.R.C. § 217(b)(1).

121. See text accompanying note 100 *supra*.

Kowalski Court attempt a similar approach. The taxpayer had argued that it was inequitable to allow armed forces personnel to exclude their subsistence and quarters allowances when state troopers could not. The Court's reasoning was that equity is not applicable to tax questions and that repeal of section 120,¹²² which had specifically excluded certain state and local police force meal allowances, was indicative of prior congressional consideration of this problem.¹²³

Undoubtedly it was unnecessary for the Court in reaching its decision to consider the duties of state troopers, given its narrow view of section 119. Nevertheless, in answering the taxpayer as it did, the Court is vulnerable to the attack used by Justice Blackmun in his dissenting opinion. For example, Justice Blackmun indicated that the Treasury Regulations, as the sole basis of exclusion for armed forces cash allowances, are "a thin and weak support for recognizing a substantial benefit for the military and denying it for the New Jersey state trooper counterpart."¹²⁴ This type of attack assumes that not only are the duties of state troopers similar to those of military personnel, but so are the methods of and reasons for paying their respective allowances. This easily made assumption is unwarranted since nowhere in the literature concerning the state trooper cases has there been a direct comparison of the Department of Defense pay and allowances system with the allowance system of any state. Examining the opinions of the Tax Court and of the Supreme Court in *Kowalski*, this writer has found twelve grounds on which the New Jersey state trooper subsistence allowance may be distinguished from that paid to enlisted members of the armed forces. This section of the Case Comment will discuss several of these differences, demonstrating that while the armed forces system is largely noncompensatory, the system evolved by New Jersey was definitely compensatory.¹²⁵

122. Technical Amendments Act of 1958, Pub. L. No. 85-866, § 3, 72 Stat. 1606.

123. 434 U.S. at 94.

124. *Id.* at 98.

125. The system used in New Jersey is described in 434 U.S. at 79-80 and 65 T.C. at 45-49. For statutes concerning military compensation, see Titles 10 and 37 of the United States Code. Regulations pertinent to all military services are found in the DEPARTMENT OF DEFENSE MILITARY PAY AND ALLOWANCES ENTITLEMENTS MANUAL (1979) [hereinafter cited as DODPM]. For examples of more specific branch regulations, see the NAVY PAY AND PERSONNEL PROCEDURES MANUAL (1979) (NAVSO P-3050) and the BUREAU OF NAVAL PERSONNEL MANUAL (1979) (NAVPERS 15791B) [hereinafter cited as BUPERSMAN]. Regulations found in the Code of Federal Regulations are sketchy and in some instances out of date. Compare 32 C.F.R. § 715.6 (1976) (enlisted naval personnel E-3 and below required to make allotment of pay to dependents) with BUPERSMAN 6210120 (allotments not required). Where not otherwise documented, the author's experiences as a personnel management specialist in the U.S. Navy form the basis of comparison.

There are differences between the New Jersey system and that used by the armed services which are of less value in assessing the nature of the former system. First, New Jersey paid its troopers in advance while service members receive pay only as they earn it. 37 U.S.C. §§ 402(b), 1006 (1976); DODPM ¶40103, Table 4-1-1, Rules 8-9. Second, the New Jersey allowance was kept separate from other items of pay. Only recently has payroll computerization by the armed services enabled separate statement of all allowances. Third, there is a material difference in the amounts paid. The maximum payable in New Jersey in 1970 for the mid-shift meal was \$143 per month. The enlisted allowance for 1970 for three meals was only \$76.95 per month when messing in kind was not available. 37 U.S.C. § 402(d) (1970).

First, the Department of Defense provides that because rations in kind are preferred, an affirmative act is required to start payment of subsistence allowances.¹²⁶ Whenever government messing is certified as available, no cash payments are made. Example of periods of nonpayment include hospitalization,¹²⁷ confinement,¹²⁸ leave,¹²⁹ or travel.¹³⁰ When there is no indication whether messing was available, there is a presumption that it was. In contrast, New Jersey paid its troopers on a continual basis, whether they were on duty, off duty, or on vacation.

Second, the two systems have different roles in personnel procurement. Although New Jersey did not intend that its meal allowance be regarded as compensation, the state police recruiting brochure used the allowance to entice prospective troopers.¹³¹ The promise of tax-free allowances is not part of first term armed forces recruiting, although such incentives as comprehensive medical care for members and their dependents are promoted. Comparable benefits may not be available to civilian police departments.

Third, the rates of military and state trooper subsistence allowances are determined differently. Military allowances are established by Congress,¹³² which is subject to diverse political pressures. By contrast, New Jersey established its rates through collective bargaining with the union that represented the troopers.

Fourth, the armed forces distinguish only between officer and enlisted allowances and the amount given to enlisted personnel is greater.¹³³ In contrast, New Jersey allowances increased with rank. An increase in privileges with the rank attained may be a valid tool of management, but it conflicts with the idea that such allowances are noncompensatory.

Fifth, the military pension system uses only base pay to calculate retirement benefits.¹³⁴ New Jersey, in sharp contrast, included the subsistence allowance. Presumably, the working conditions that necessitate an allowance cease upon retirement. The inclusion of the

Finally, in New Jersey, a cash allowance is more practical. The provision of meals in kind is the only method possible for use under combat conditions and normal sea duty.

126. 37 U.S.C. § 402 (1976); DODPM, *supra* note 125, ¶ 30111; BUPERSMAN, *supra* note 125, 2640100.

127. DODPM, *supra* note 125, Table 3-1-6, Rule 3.

128. *Id.* Rule 6.

129. BUPERSMAN, *supra* note 125, 2640140.

130. DODPM, *supra* note 125, Table 3-1-5, Rule 1.

131. A discrepancy exists between the characterization of this brochure by the Tax Court and the Supreme Court. *Compare* 65 T.C. at 47 ("On the advertising brochure the meal allowance is described as an item to be received in addition to the base salary.") with 434 U.S. at 80 ("an item of salary to be received in addition to an officer's base salary . . .") (emphasis added).

132. 37 U.S.C. §§ 1008-1009 (1976).

133. Officers receive \$62.80 per month while enlisted personnel receive \$90.00 per month. Exec. Order No. 12,087, 43 Fed. Reg. 46,823 (1978).

134. 10 U.S.C. § 1401 (1976); BUPERSMAN, *supra* note 125, 2630100.

allowance in pensions is a reflection that the state and its troopers were misusing a tax provision to increase compensation.

Sixth, the number of personnel affected varies greatly. The total number of troopers in New Jersey is only fifteen hundred. The Navy alone has over one-half million men and women in uniform. The vast scope of its operations enables the federal government to use efficient means of disbursement control which would be unavailable or impractical for use by the states. The seventh distinction follows from this difference in size: to improve personnel management efficiency in its huge military operations, the federal government has necessarily established large bureaucracies with elaborate rules governing each duty situation that may arise. It is likely that New Jersey paid its allowances continuously without regard for actual meals consumed in order to keep accounting expenses low.¹³⁵

The eighth, and probably most important, distinction is based on the source of benefit: the federal government on the one hand, as opposed to the states or private employers on the other. This difference has been noted in other cases,¹³⁶ and while perhaps unfair, explains the different treatment of the two classes more readily than very narrow distinctions predicated upon "convenience" to the employer or the employee. It is also a meaningful distinction because both the executive and legislative branches of the federal government provide controls over disbursement of subsistence allowances that New Jersey does not. For example, the Navy's district commandants and base commanders issue very specific supplemental directives to naval regulations.¹³⁷ The General Accounting Office also audits local practices for Congress. Such controls are highly unlikely to be instituted by Congress for state police expenditures.

There are, however, compensatory features common to both systems that make this comparison of differences less than perfect. In both organizations members have wide discretion over the quality and content of meals purchased with the allowance but must obtain formal permission to begin each meal. Moreover, the allowance is not intended by the employer as compensation, although members may perceive it as such. Under the two systems, members are subject to emergency recall at any time. Three similarities in particular are inconsistent with the noncompensatory intent of both employers: allowances are paid in cash, employees are not required to purchase food with the allowance, and employees are not required to account for expenditures.

These similarities, however, are not persuasive. The eight differences are sufficient to show that New Jersey did not do a very good job of

135. *Keeton v. United States*, 256 F. Supp. 576 (D. Colo. 1966), *aff'd*, 383 F.2d 429 (10th Cir. 1967).

136. *See, e.g., Benaglia v. Commissioner*, 36 B.T.A. 838, 842 (1937) (Arnold, Member, dissenting).

137. *See, e.g., Dep't of the Navy, Commandant, Third Naval District, "Basic Allowance for Subsistence (BAS) for Enlisted Personnel; control procedures for"* (COMTHREEINST 7220.11B).

creating a noncompensatory cash allowance system. To a limited extent, the Court agreed when it held that even if a convenience of the employer doctrine survived the 1954 Code, the facts of *Kowalski* do not meet the standards established by *Van Rosen* and *Saunders*.¹³⁸

IV. CONCLUSION

In its narrowest sense, *Commissioner v. Kowalski* is the resolution of a difference between the federal courts of appeals on an issue of tax law. Perhaps the result that cash allowances for meals may not be excluded from gross income under section 119 is too sweeping if it removes exclusions not only for generous compensatory systems like New Jersey, but also for genuinely noncompensatory systems. From that viewpoint, the hairsplitting engaged in by some courts to justify different results from prior decisions was proper.¹³⁹ But even assuming that section 119 excludes cash allowances as well as benefits in kind, reversal of the Third Circuit's brief, unanalytical opinion was necessary because that court had shown itself incapable of distinguishing between compensatory and noncompensatory systems. *Kowalski* is a proper decision because it prevents decisions that allow employer and employee to collude under a common-law convenience of the employer doctrine.

Kowalski was also a vehicle for the Court to interpret the Internal Revenue Code. Construing the intent of Congress, it held that section 119 may be used in only a limited number of circumstances. It is now clear that section 119 does not cover cash payments. More importantly, section 61 cannot be used to create exclusions when Congress has preempted the matter by another statute. Further, because of its broad nature, section 61 may not be used to create an exemption when no statute yet exists. Whatever the differences of opinion among the members of the Supreme Court concerning section 119, the Court was unanimous in its interpretation of section 61.

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138. 434 U.S. at 95.

139. See, e.g., *Ghastin v. Commissioner*, 60 T.C. 264 (1973).